

AUT-2020-3-005

a) Austria / b) [Constitutional Court](#) / c) / d) 11-12-2020 / e) G 4/2020 / f) / g) ECLI:AT:VFGH:2020:G4.2020 / h) CODICES ([German](#)).

Keywords of the systematic thesaurus:

[03.07](#) General Principles - Relations between the State and bodies of a religious or ideological nature.

[03.17](#) General Principles - Weighing of interests.

[05.02.02.06](#) Fundamental Rights - Equality - Criteria of distinction - Religion.

[05.03.18](#) Fundamental Rights - Civil and political rights - Freedom of conscience.

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[Headscarf, prohibition](#) / [Religion, clothing, restriction](#) / [Religion, headscarf, symbol](#) / [Religion and ideology, neutrality of the state](#) / [Schools, wearing of veils](#), prohibition.

Headnotes:

A ban on wearing the Islamic headscarf at elementary schools violates the principle of equality in conjunction with the right to freedom of thought, conscience and religion. A provision that only affects a certain group of female students and that remains selective in order to ensure religious and ideological neutrality as well as gender equality fails to achieve its regulatory objective and is not objectively justified.

Summary:

I. Pursuant to § 43a of the School Education Act (*Schulunterrichtsgesetz*, hereinafter, "*SchUG*"), schoolchildren are prohibited from wearing ideologically or religiously characterised clothing that involves covering the head until the end of the school year in which they reach the age of 10 (paragraph 1). In the event of a violation, the parents are to be invited to a mandatory conversation. If another violation occurs afterwards, a fine can be imposed (paragraphs 2 and 3).

The applicants – two schoolgirls under 10 years of age at elementary school who are religiously educated in the sense of the Sunni and the Shiite legal school of Islam respectively, and their parents – filed an individual application against § 43a *SchUG*, claiming, in particular, a violation of their right to religious freedom and to religious education of children.

II. The Constitutional Court pointed out that, according to the law-making process, § 43a *SchUG* is specifically intended to prohibit the wearing of an Islamic headscarf; it does not

include, for instance, the Jewish kippah or the *patka* worn by Sikhs. "Covering of the head" is therefore to be interpreted narrowly as a form of covering according to Islamic tradition.

The Court underlined that the principle of equality in conjunction with [Article 9 ECHR](#) and Article 14 of the Basic Law on the General Rights of Nationals establishes the principle of the religious and ideological neutrality of the state. When shaping the school system, the legislature must comply with this requirement by treating all religious and ideological beliefs based on the principle of equality. Moreover, school is based, among others, on the basic values of openness and tolerance (Article 14.5.a of the Federal Constitutional Act).

According to the Court, in the context of the school, ensuring these constitutional requirements can also justify restrictions on the rights of students and parents guaranteed by [Article 9 ECHR](#), provided that these restrictions are proportionate and objective. A provision that selectively singles out a certain religious or ideological belief – such as § 43a *SchUG*, which prohibits the covering of the head in accordance with Islamic tradition, in particular the Islamic headscarf – requires a special objective justification with regard to the requirement of religious and ideological neutrality.

The prohibition in § 43a, paragraph 1, Clause 2 *SchUG* expressly aims to serve the social integration of children in accordance with local customs and traditions, the preservation of basic constitutional values and educational goals, as well as the equality of men and women. The Constitutional Court emphasised that a law that counteracts undesirable gender segregation and thus serves social integration and gender equality pursues an important objective. However, such a regulation must be proportionate and objective.

The Court observed that wearing the Islamic headscarf may have various reasons. It may express an affiliation with Islam, an alignment of one's life with the religious values of Islam. It can also be interpreted as a sign of belonging to Islamic culture or of adherence to the traditions of the community of origin. The Islamic headscarf therefore has no clear and unambiguous meaning. Especially when it comes to questions of freedom of religion and belief, however, the Constitutional Court is barred from adopting one specific interpretation of a religious or ideological symbol; therefore, it cannot base its assessment of the legitimacy of such symbols in state educational institutions on this interpretation.

The Court pointed out that the prohibition in § 43a *SchUG* – which only applies to girls and prohibits them from wearing an Islamic headscarf – is not suitable to achieve the objectives formulated by the legislature. Rather, the selective ban can also have a detrimental effect on the inclusion of affected girls and lead to discrimination because it carries the risk of marginalizing Muslim girls or making it difficult for them to access education. The prohibition selectively chooses a single religiously or ideologically motivated clothing regulation and specifically stigmatises a certain group of people.

With regard to the aim of protecting schoolgirls against social pressure from their classmates, the Constitutional Court admitted that there can be situations of ideological and

religious conflict. However, this cannot justify the selective prohibition in § 43a *SchUG* which only addresses schoolgirls wearing a headscarf – and not those exerting undue social pressure on them.

The Constitutional Court concluded that a provision focusing on a certain religion or ideology and its specific expression in one (and only one) type of clothing is not compatible with the constitutional principle of ideological and religious neutrality of the state; such a provision fails to meet its regulatory goal and is not objective. § 43a *SchUG* was therefore found to be unconstitutional because it violates the principle of equality in conjunction with the right to freedom of thought, conscience and religion.

Cross-references:

European Court of Human Rights:

- *Kjeldsen et al. v. Denmark*, no. 5095/71, 07.12.1976;
- *Campbell u. Cosans v. United Kingdom*, no. 7511/76, 25.02.1982;
- *Kokkinakis v. Greece*, no. 14307/88, 25.05.1993;
- *Valsamis*, no. 21787/93, 18.12.1996;
- *Dogru v. France*, no. 27058/05, 04.12.2008;
- *Osmanoglu and Kocabas v. Switzerland*, no. 29086/12, 10.01.2017.

Languages:

German.